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CIVIL LAW IN LOUISIANA

THE CONTINUING DEBATE OF CONTINUING TORT: THE LOUISIANA SUPREME COURT'S TREATMENT OF THE CONTINUING TORT DOCTRINE IN *HOGG V. CHEVRON USA, INC.*

Mark Assad*

On July 6, 2010, the Louisiana Supreme Court decided an important installment in the debate surrounding the proper application of the continuing tort doctrine.¹ The court held that, under Louisiana law, the continuing tort doctrine suspends prescription if the operating cause, defined by the majority as the initial tortious act of the defendant rather than the subsequent effects, is continuing in nature.

I. BACKGROUND

Plaintiffs brought suit against neighboring property owners, Chevron USA, Inc., and the operator of the service station located thereon, alleging property damage resulting from leaking gasoline tanks located beneath the service station.² On discovering the leaks in 1997, defendant replaced the tanks. In 2001 and 2002, plaintiffs received two letters from the Louisiana Department of Environmental Quality (LDEQ) apprising them of the gasoline contamination in the area surrounding the service station and informing the plaintiffs that LDEQ may ask permission to perform environmental tests on their property in the future. On September

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1. *Hogg v. Chevron USA, Inc.*, 09-2632 (La. 2010), 45 So. 3d 991.

2. *Id.*

12, 2006, the plaintiffs were contacted concerning access to their property for the purpose of conducting remediation.

On September 6, 2007, the plaintiffs filed suit against the defendants under the tort theory of trespass “seeking damages for diminution of the value of their property, the stigma of owning contaminated property, loss of enjoyment of use of the property, and exemplary damages.”³ The plaintiffs argued that the presence of the gasoline, the defendants’ failure to remove it, and the ill effects sustained resulted in a viable claim in trespass under Louisiana tort law. Defendants subsequently filed motions for summary judgment asserting plaintiff’s action was barred by the one-year liberative prescription pursuant to Louisiana Civil Code articles 3492 and 3493. Defendants argued that plaintiffs were aware of the damage from the letters received in 2001 and 2002, and therefore prescription began to run upon receipt of those letters.⁴ Plaintiffs argued the letters were subject to more than one reasonable interpretation and summary judgment was inappropriate because the reasonableness of their interpretation was an issue of material fact to be decided at trial.⁵ The district court agreed with the plaintiffs and denied the defendant’s motions for summary judgment.⁶ The Court of Appeal, Second Circuit, declined the defendant’s application for supervisory writ; however, the Supreme Court of Louisiana subsequently granted writs to review the district court’s denial of summary judgment.⁷

II. JUDGMENT OF THE COURT

The Supreme Court of Louisiana addressed two primary issues in its decision. First, the Court had to decide whether or not the LDEQ letters sent to plaintiffs were sufficient to give them actual

3. *Id.*

4. *Id.* at 996.

5. *Id.*

6. *Id.*

7. Hogg v. Chevron USA, Inc., 28 So. 3d 263 (La. 2010).

or constructive knowledge of the contamination such that prescription began to run upon the plaintiffs' receipt of the letters. Second, the Court addressed the continuing tort doctrine and whether or not it was applicable to the facts before the Court.

Regarding the first issue, the Court noted that "there is no question as to what the plaintiffs knew and when [they knew it]" because the "[p]laintiffs' knowledge is contained in the letters."⁸ A plain reading of the letters, according to the Court, clearly indicated that there was soil and groundwater contamination in the area surrounding the service station; therefore, there was no issue of material fact regarding whether or not this amounted to actual or constructive knowledge.⁹ Instead, the Court framed the issue as whether or not the plaintiffs' knowledge from the letters constitutes actual or constructive knowledge such that prescription began to run upon their receipt.¹⁰ Because the dispute concerns whether or not the letters amount to actual or constructive knowledge and not what the substance of the letters contained, the Court found that summary judgment was appropriate.¹¹

In addressing whether the doctrine of continuing tort would suspend prescription for the plaintiffs' claim, the Court first addressed plaintiffs' assertion that the presence of the gasoline on their property was a trespass, and its continued presence was, in fact, continuing tortious activity by the defendants.¹² The Court also distinguished continuous and discontinuous operating causes, relying on *Crump v. Sabine River Authority*, where the Louisiana Supreme Court stated, "[a] continuing tort is occasioned by [continual] unlawful acts, not the continuation of the ill effects of an original, wrongful act."¹³ Applying this standard to the present

8. Hogg, 45 So. 3d at 999.

9. *Id.* at 1000.

10. *Id.* at 999.

11. *Id.*

12. *Id.* at 1002.

13. *Crump v. Sabine River Authority*, 98-2326 (La. 1999), 737 So. 2d 720, 728.

case, the Court held that the operating cause of the injury was the leaking of the gasoline out of the tanks, which was abated in 1997, rather than the continued presence of the gasoline on the property.¹⁴ Therefore, the tortious activity alleged by plaintiffs ceased in 1997 and the continuing ill effects of that conduct does not suspend the running of prescription under the doctrine of continuing tort. However, prescription did not begin to run until years later because plaintiffs were not made aware of the injury until the letters were received in 2001 and 2002.¹⁵ Nevertheless, plaintiffs' suit, filed in 2007, was not within the one-year prescriptive period for tort actions.¹⁶

III. COMMENTARY

First, the procedural posture of the case is worth noting. The appeal was from a motion for summary judgment that was denied at the trial court, thus the question was whether or not there was a genuine issue of material fact in existence such that judgment could not be rendered as a matter of law.¹⁷ Overturning the trial court's ruling, the Louisiana Supreme Court held that, because there was no issue of material fact regarding when the plaintiffs acquired actual or constructive knowledge, summary judgment was appropriate.¹⁸ The only question left after this factual determination was whether or not the defendant was entitled to judgment as a matter of law, which the court found it was through

14. Hogg, 45 So.3d at 1006.

15. LA. CIV. CODE art. 3493 provides: "[w]hen damage is caused to immovable property, the one year prescription commences to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage."

16. LA. CIV. CODE art. 3492 provides in pertinent part that "[d]elictual actions are subject to a liberative prescription of one year." In the context of this case, the provisions of Louisiana Civil Code art. 3493, *id.* note 15, apply as to when the one-year liberative prescription commences.

17. LA. CODE CIV. PROC. ANN. art. 966(B) (2011). The article provides that summary judgment should be granted if "there is no genuine issue as to material fact, and ... [the] mover is entitled to judgment as a matter of law."

18. Hogg, 45 So. 3d at 1006.

the correct interpretation of the continuing tort doctrine. For the purposes of this note, the court's treatment of the continuing tort doctrine is the central issue to be considered.

The plaintiffs argued for the application of the continuing tort doctrine in order to circumvent prescription.¹⁹ The plaintiffs characterized the presence of the gasoline as a trespass and asserted, consequently, that the trespass continued as long as the gasoline remained on the property. The Court acknowledged this argument and summarily dismissed it for two reasons. First, the Court questioned whether the leaking of the gasoline was a trespass at all because there was little evidence that the defendants intended the gasoline to enter plaintiffs' land.²⁰ The Court only briefly questioned whether or not the gasoline's presence was a trespass at all because a final determination on that issue was not necessary to address the continuing tort doctrine and prescription. As the Court noted, the issue of whether or not an underground leak falls within trespass, nuisance, neither, or both, is more appropriate for another discussion.

Second, the Court stated that defining the presence of the gasoline as continuing tortious activity in the form of a trespass would render trespass "an imprescriptible species of tort, an argument at odds with the plain language of Louisiana Civil Code arts. 3492 and 3493, which makes no exception of trespass...."²¹ The majority's position on this issue is well grounded in light of the plain meaning of the prescription articles, which make no indication that an expansive reading is appropriate. In fact, the Official Revision Comment (b) to Louisiana Civil Code art. 3492

19. The applicable liberative prescription period in delictual actions is generally one year pursuant to LA. CIV. CODE art. 3492. *See supra* note 16.

20. Hogg, 45 So.3d at 1002 (the Court specifically states in n.11 that "civil trespass is generally considered to be an intentional tort, requiring proof that the defendant took some intentional action that resulted in harm to the plaintiff.").

21. *Id.* at 1002, n.12.

states that the one-year prescription applies to *all* delictual actions.²²

The decision turns on how to define the operating cause of the damage, and the majority opinion is consistent with jurisprudence regarding the continuing tort doctrine.²³ The Louisiana Civil Code offers no guidance regarding the continuing tort doctrine, which has developed primarily through jurisprudence. In *Crump*,²⁴ the Louisiana Supreme Court defined the operating cause of the injury in order to determine the applicability of the continuing tort doctrine. In that case, the defendants created a canal on land adjacent to the plaintiff's, which caused continued flooding on the plaintiff's land. The Court held that the operating cause was digging the canal - not the water that was spilled onto plaintiff's land.²⁵ Instead, the Court characterized the water that remained on plaintiff's land as the "continuing ill effects arising from a single tortuous act."²⁶ The initial act of digging the canal was the operating cause of the injury suffered, not the continued presence of the water on the plaintiff's property. The Supreme Court presented the issue as a problem of determining where the line between cause and effect was drawn, and essentially held that only the initial act should be considered the operating cause of the injury suffered within the context of the continuing tort doctrine.

Justice Knoll's dissent argues in favor of considering the presence of the gasoline a continuing tort that would suspend prescription, which differs from the majority position that views the "operating cause" of the tortious effects as only the initial act of the defendants. Justice Weimer, writing for the majority, defines

22. *Id.*

23. *See* *Marin v. Exxon Mobil Corp.*, 09-2368 (La. 10/19/10), 48 So. 3d 234 (reaffirming the holding in *Hogg*, *supra* note 1); *Crump v. Sabine River Authority*, 98-2326 (La. 1999), 737 So. 2d 720; *South Central Bell Telephone Company v. Texaco, Inc.*, 418 So. 2d 531 (La. 1982); *Mouton v. State of Louisiana*, 525 So. 2d 1136 (La. App. 1 Cir. 1988), writ denied, 526 So. 2d 1112 (La. 1988).

24. *Crump*, 737 So. 2d at 728.

25. *Id.* at 731.

26. *Id.* at 728.

the operating cause of the injury as the actual leaking of the gasoline from the tanks. In contrast, Justice Knoll's position is that the continued presence of the gasoline is causing the harmful effects to plaintiffs and therefore the presence should be considered the cause of the injury suffered. The fundamental question of where to draw the line for cause and effect²⁷ is apparently still contentious among current Justices of the Louisiana Supreme Court. The majority's holding, aligned with Louisiana Supreme Court jurisprudence, considers the leak from the tanks the initial, operating cause of the injury, and therefore it *alone* is the tortious activity in the present case. Consequently, the contamination of plaintiffs' land itself is the injury, or the effect, of the operating cause along with any additional effects that may arise as a result of the leak.

In light of the Louisiana Supreme Court's past rulings regarding the doctrine of continuing tort and the holding in this case, there is a clear indication that the Court is unwilling to expand the prescriptive period beyond the initial act (or acts) constituting the operating cause of the injury. The prescriptive period in such cases begins to run as soon as the defendant's tortious conduct ceases and the plaintiff knows or should know of the damage caused by the act.

However, it is worth noting that Louisiana is not alone in its confusion over the appropriate circumstances for the continuing tort doctrine's application. For example, in *Nieman v. NLO, Inc.*,²⁸ the federal Sixth Circuit ruled that Ohio's continuing trespass doctrine requires no showing of continuing conduct, but rather

27. The question of whether the continuing conduct (cause) or the continuing damage (effect) is the proper method of defining a continuing tort is recognized in national sources as an area that is generally unsettled. *See* 54 C.J.S. Limitations of Actions § 223 (2012) ("Under the continuing tort doctrine, where a tort involves a continuing or repeated injury, the limitations period does not begin to run until the date of the last injury *or* the date the tortious acts cease...") (emphasis added). The use of the "or" demonstrates the rift in jurisdictions' analysis for defining a continuing tort.

28. 108 F.3d 1546 (6th Cir. 1997).

only a showing of continuing damage. Interestingly, Judge Krupansky's dissent mirror's the Louisiana Supreme Court majority's reasoning in *Hogg*, noting that "[o]ngoing *conduct* is the key to a continuing tort. Where no continuing action by the defendant is necessary to effect the damage in controversy—that is, where the tort is an accomplished fact, such as when intangible pollutants have impacted the plaintiff's property...—the tort is permanent" and thus prescribed.